

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
JOSEPH SAFDIEH, : 20-CV-3073 (CBA)  
Plaintiff, :  
-against- : United States Courthouse  
CITIBANK, N.A. and HSBC BANK : Brooklyn, New York  
USA, N.A., :  
Defendants. : Friday, January 15, 2021  
-----X : 2:00 p.m.

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT  
BEFORE THE HONORABLE CAROL BAGLEY AMON  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiff LAW OFFICE OF SAMUEL KATZ, PLLC  
and Counter 4533 16th Avenue  
Defendant: Brooklyn, New York 11204  
BY: SAMUEL KATZ, ESQ.

For the Defendant, ZEICHNER, ELLMAN & KRAUSS, LLP  
Cross-Claimant, and 575 Lexington Avenue  
Counter Claimant New York, New York 10022  
Citibank, N.A.: BY: BRUCE S. GOODMAN, ESQ.

For the Defendant, PHILLIPS LYTLE, LLP  
Cross-Defendant and 125 Main Street  
Counter Defendant Buffalo, New York 14203  
HSBC Bank USA, BY: PRESTON L. ZARLOCK, ESQ.  
N.A.:

AND

ANTHONY DIPAOLO, PC  
235-07 Braddock Avenue  
Queens Village, New York 11428  
BY: ANTHONY DIPAOLO, ESQ.

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A P P E A R A N C E S (CONTINUED)

Court Reporter: DAVID R. ROY, RPR  
225 Cadman Plaza East  
Brooklyn, New York 11201  
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Proceedings recorded by Stenographic machine shorthand,  
transcript produced by Computer-Assisted Transcription.

P R O C E E D I N G S

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(All participants appearing via telephone  
conference.)

THE COURT: All right. Good afternoon. This is  
Judge Amon.

Ms. Morris, do you want to call the case for us,  
please.

THE COURTROOM CLERK: This is Case Number  
20-CV- 3037, Safdieh versus Citibank, et al. on for an oral  
argument or HSBC's motion to dismiss.

Representing Plaintiff Joseph Safdieh is  
Samuel Katz. Representing Defendant and Cross-Claimant  
Citibank is Bruce Goodman --

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1 THE COURT: Okay.

2 THE COURTROOM CLERK: -- and representing  
3 Defendant and Cross-Defendant HSBC are Preston Zarlock and  
4 Anthony DiPaolo.

5 THE COURT: All right. Thank you.

6 These are motions made by HSBC. The first motion  
7 is to dismiss against the plaintiff's claim for conversion,  
8 and the second is to dismiss, as I understand it, Citibank's  
9 cross-claim.

10 Ms. Zarlock, I note you will be dealing with the  
11 conversion claim --

12 MR. ZARLOCK: That is correct, Your Honor.

13 THE COURT: -- and Mr. DiPaolo with the  
14 cross-claims; is that correct?

15 MR. DIPAOLO: That is correct, Your Honor.

16 THE COURT: All right.

17 Mr. Zarlock, do you want to be heard first of all  
18 on the plaintiff's conversion claim?

19 MR. ZARLOCK: Yes, thank you, Your Honor. I will  
20 try to be both clear and brief in consideration of the  
21 briefing that has already by providing to the Court.

22 There is a sole claim in the complaint against  
23 HSBC, which is the conversion --

24 (Pause in proceedings.)

25 MR. ZARLOCK: There is a sole claim against HSBC

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1 in the complaint which is a claim for conversion. The facts  
2 are essentially undisputed. HSBC is the mortgagee for the  
3 plaintiff on a defaulted mortgage in an action that's  
4 already past summary judgment in favor of HSBC in state  
5 court. After summary judgment, there was a property loss in  
6 January of 2019 and a joint check was made payable in the  
7 amount of \$233,000, which I'll refer to as the AIG check,  
8 made jointly payable to Plaintiff and HSBC. That check was  
9 deposited by Plaintiff without HSBC's endorsement in the  
10 Citibank account and paid. Thereafter, the account was paid  
11 down -- or excuse me, the account was drawn down to about  
12 \$107,000. A check for the balance was issued by Citi to  
13 Plaintiff, but apparently thereafter stopped. In the  
14 interim, HSBC, having discovered that the check was paid, a  
15 joint check paid without its endorsement, made claim against  
16 Citibank and Citibank paid HSBC in full and presented HSBC  
17 with a settlement agreement in return for that payment.

18 Now, the sole claim against HSBC is conversion,  
19 but the only -- it's undisputed that the only monies which  
20 HSBC received was the Citibank check. That check was  
21 payable only to Citi, only to HSBC. So therefore, for four  
22 reasons there can be no claim by Plaintiff against HSBC for  
23 conversion. First of all, Plaintiff was not a payee on the  
24 Citibank check.

25 Secondly, based on the authority of the

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1 *Barclays Bank* case, Plaintiff had no possession of the check  
2 which was -- and the check was not payable to it; so  
3 therefore, it doesn't have a claim for conversion.

4 Third, it is well settled that funds in a bank  
5 account cannot be converted. They're basically essentially  
6 a debit/credit system. And this case is even farther afield  
7 from the normal situation. The case most on point is the  
8 *McBride* case that's cited in our brief several times where  
9 there were several levels of payment, and ultimately you  
10 can't trace funds like that for conversion. There must be a  
11 distinct source of funds even when funds, you know, can be  
12 converted.

13 And finally, ultimately, they don't have any  
14 right, Plaintiff has no right to the proceeds, it's a  
15 defaulted mortgage. Under the *Builders* case cited in our  
16 brief, it is up to the lender how to apply those proceeds.  
17 And so ultimately they wouldn't have a claim to property,  
18 which would be required for any conversion claim.

19 So for any or all of those reasons, the complaint  
20 should be dismissed against HSBC.

21 THE COURT: You are talking about a motion to  
22 dismiss. And just simply with regard to your last  
23 argument --

24 MR. ZARLOCK: Yes, Your Honor.

25 THE COURT: -- this foreclosure and all of that

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1 information is not on the face of the complaint; is that  
2 correct?

3 MR. ZARLOCK: It is not, Your Honor.

4 THE COURT: So you --

5 MR. ZARLOCK: The Court can take judicial notice  
6 on motions to dismiss, and we cited that in our brief  
7 related to state court and other proceedings.

8 THE COURT: All right.

9 Let me ask: Mr. Katz, is it basically undisputed  
10 that at the time of the property damage and when the money  
11 was issued that it had been foreclosed, the mortgage had  
12 been foreclosed?

13 MR. KATZ: Good afternoon, Your Honor. Samuel  
14 Katz.

15 THE COURT: Good afternoon.

16 MR. KATZ: I don't know the answer to that  
17 question. I'm not foreclosure counsel in the foreclosure  
18 case and I don't know whether at the time of the loss, the  
19 foreclosure was ready to be commenced. I certainly don't  
20 think that summary judgment was already granted to the bank  
21 at that stage, but I don't know this -- in fact, I will  
22 defer to Mr. -- to --

23 THE COURT: What is your -- well, I am not quite  
24 sure that I understand your theory of conversion. The check  
25 from Citibank for the \$33,000 was issued to HSBC. That was

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1 not a check that your client was named on or anything else.

2 So what was converted? Are you saying that --

3 MR. KATZ: That's correct, Your Honor.

4 THE COURT: Are you saying that that check -- is  
5 it not your theory that that check was converted or that --  
6 well, tell me what was converted under your theory. I am  
7 not sure --

8 MR. KATZ: Our theory is --

9 THE COURT: -- that I quite understand what you  
10 are --

11 MR. KATZ: Our theory is that -- I apologize,  
12 Your Honor.

13 Our theory is that the funds were spent and that  
14 was converted. It's undisputed, Your Honor, that  
15 \$233,000 --

16 (Audio cuts out briefly.)

17 THE COURT: Let me just ask -- and I'm sorry,  
18 Mr. Katz -- that the funds that were originally in your  
19 client's account were converted? Is that what was  
20 converted?

21 MR. KATZ: No. No, our claim is that the AIG  
22 check my client had deposited into his bank account only  
23 with his endorsement, which Citibank accepted, that money  
24 was then sent over to HSBC when they made their warranty  
25 claim.

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1 THE COURT: Okay.

2 MR. KATZ: Those funds were to be, at the very  
3 least --

4 (Audio cuts out briefly.)

5 MR. KATZ: -- payable to both HSBC and my client,  
6 because they were the AIG funds.

7 THE COURT: Your client was --

8 MR. KATZ: And by virtue of --

9 THE COURT: I apologize for interrupting you.  
10 Let me ask you something, Mr. Katz.

11 MR. KATZ: Yes, Your Honor.

12 THE COURT: Was there other money in your client's  
13 account or was this is the only money in your client's  
14 account?

15 MR. KATZ: I believe this was the only money in my  
16 client's account at the time that he got the AIG check. But  
17 I do not know this for sure.

18 (Audio cuts out briefly.)

19 MR. KATZ: We have not done extensive discovery  
20 yet. We have done very little discovery in this case. I  
21 don't know this for sure at this point. But if it was not  
22 the only money in his account --

23 (Audio cuts out briefly.)

24 MR. KATZ: -- it was definitely the majority of  
25 the amount of money in his account by far, Your Honor.



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1 THE COURT: Well, he already spent -- by his own  
2 admission if we do the math, he already spent \$100,000 of  
3 money that even he claims belonged to both he and AIG.  
4 Right?

5 MR. KATZ: Well, he claims that the money belongs  
6 to him, but he does admit that it was payable to both, and  
7 that it --

8 (Audio cuts out briefly.)

9 MR. KATZ: -- required HSBC's endorsement.

10 THE COURT: All right.

11 MR. KATZ: But I don't think that --

12 (Audio cuts out briefly.)

13 MR. KATZ: -- you know, the facts contradict each  
14 other. So he contends today that the money --

15 (Audio cuts out briefly.)

16 THE COURT: Mr. Katz --

17 MR. KATZ: -- belongs to HSBC --

18 THE COURT: -- for some reason -- Mr. Katz, I'm  
19 sorry, but how are you calling in? Because your voice keeps  
20 breaking up, sir. It is very difficult for me to understand  
21 you.

22 MR. KATZ: I'm sorry. I'm calling in on a  
23 landline.

24 (Pause in proceedings.)

25 MR. KATZ: Is this better?

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1 THE COURT: Yes, uh-huh.

2 MR. KATZ: Okay.

3 THE COURT: It is much better.

4 MR. KATZ: I apologize. I picked up the receiver.

5 THE COURT: Okay.

6 MR. KATZ: All right. So as I was saying, it's  
7 the funds that HSBC currently holds --

8 (Audio cuts out briefly.)

9 MR. KATZ: -- that HSBC admits --

10 (Audio cuts out briefly.)

11 MR. KATZ: -- either that they're applying it --

12 (Audio cuts out briefly.)

13 MR. KATZ: -- to my client's account --

14 THE COURT: You are still breaking up badly. I do  
15 not know what the problem with your correction is, sir.

16 MR. KATZ: I am going to call in from another  
17 phone.

18 Can I do that?

19 THE COURT: Allison, will that work?

20 THE COURTROOM CLERK: Yes. He can hang up and  
21 then just dial in on the same number on a different phone.

22 THE COURT: Okay.

23 MR. KATZ: Okay. Your Honor, I just need one  
24 moment for that.

25 THE COURT: Okay. Sure.

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1 MR. KATZ: I apologize. Thank you.

2 THE COURT: That's all right.

3 (Pause in proceedings.)

4 MR. KATZ: I'm back, Samuel Katz.

5 Does everyone hear me now?

6 THE COURT: Yes. Hopefully this will go better.

7 MR. KATZ: I apologize.

8 THE COURT: That's okay.

9 But I do not think you have answered my question.

10 Are you contending that it was the money deposited in your  
11 account that when the AIG check was negotiated, that it was  
12 that money in your account that was converted by HSBC; is  
13 that your contention?

14 MR. KATZ: That's my contention as to part of the  
15 money, the part that was still in my client's account,  
16 Your Honor, which was taken out by Citibank and given to  
17 HSBC as part of that \$233,000 check, my conversion claim is  
18 on those funds, yes.

19 THE COURT: So you are only holding HSBC on your  
20 conversion claim responsible for the hundred-and-some  
21 thousand dollars?

22 MR. KATZ: No. We're holding them responsible on  
23 the entire amount because the entire amount is from the  
24 original AIG check that should have been earmarked to both  
25 my client and HSBC.

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1 THE COURT: But how do you -- you have got a  
2 conversion claim. How do you allege -- you are not being  
3 consistent. You said, at one point we are only alleging  
4 that what was converted was the hundred thousand which you  
5 say was used by Citibank, but Citibank did not, you know, go  
6 to your account, you know, and take out -- it is not a  
7 discrete sum. The problem that you have is that you are  
8 dealing with funds deposited in a bank account, and you are  
9 not dealing with any specific set of money. It is not like  
10 you are saying this is a car and then they transferred the  
11 car to HSBC, and HSBC converted the car. I mean, the  
12 problem that you have is the spongeability of money. So I  
13 do not know how you possible make out a conversion claim  
14 against HSBC.

15 MR. KATZ: I understand, Your Honor.

16 The point is that HSBC was using this money to  
17 apply to my client's mortgage account that they had with  
18 them. They didn't take it for themselves. It's not the  
19 typical, you know, conversion claim where the person is  
20 taking the money from one person and moving it to another  
21 person and we're trying to get that money back now from that  
22 other person. It's still in my client's account, and for  
23 that reason --

24 THE COURT: That is a whole new theory --

25 MR. KATZ: Yes.

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1 THE COURT: -- that I think --

2 MR. KATZ: So we -- we --

3 THE COURT: -- you have just articulated -- I'm  
4 sorry. Go ahead.

5 MR. KATZ: This was articulated in our memorandum  
6 of law, Your Honor.

7 THE COURT: It was?

8 MR. KATZ: Yes.

9 THE COURT: Do you want to respond to that,  
10 Mr. Zarlock?

11 MR. ZARLOCK: No, to me it wasn't articulated in  
12 the memorandum of law, and more importantly, in the  
13 complaint.

14 And if I may address one kind of related issue  
15 that you raised, Your Honor?

16 THE COURT: Yes, please.

17 MR. ZARLOCK: In our reply memorandum of law and  
18 also in our initial memorandum of law, and also we've cited  
19 *Daniels versus U.S. Bank National Association* at Page 12 of  
20 my rely, just that the Court may take judicial notice of  
21 state court proceedings without converting a motion to  
22 dismiss into a motion for summary judgment. The order for  
23 summary judgment was granted in 2018, essentially almost a  
24 full year before the loss and the AIG check. So that, I  
25 think, could be taken judicial notice of.

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1 THE COURT: But your argument does not depended on  
2 that?

3 MR. ZARLOCK: No, it does not. As the Court  
4 correctly summarized, you can't have conversion for funds in  
5 a bank account. And it's even more attenuated here because  
6 this was something Citibank paid us, not he paid directly to  
7 them, so...

8 THE COURT: Yes. I am going to grant HSBC's  
9 motion to dismiss the conversion claim --

10 MR. ZARLOCK: Thank you.

11 THE COURT: -- on the facts in the complaint there  
12 is no conversion claim.

13 So do you want to be heard further on your  
14 cross-claims? That is Mr. DiPaolo, I guess, who is going to  
15 talk about the cross-claims, and then Mr. Goodman will  
16 address those from Citibank's perspective.

17 MR. ZARLOCK: Thank you, Your Honor.

18 THE COURT: Okay.

19 Mr. DiPaolo?

20 MR. DIPAOLO: Yes, Your Honor, thank you. This is  
21 Anthony DiPaolo.

22 THE COURT: I'm sorry. I mispronounced your name.  
23 It is DiPaolo?

24 MR. DIPAOLO: DiPaolo, yes, Judge, no apology  
25 necessary.

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1 THE COURT: I should have remembered that.

2 MR. DIPAOLO: Thank you. You're not the first  
3 person to pronounce it. It's multiple vowels, so...

4 THE COURT: I have lived long enough in Brooklyn  
5 that I should know DiPaolo. So I really do just apologize  
6 to you.

7 MR. DIPAOLO: Not a problem. Not a problem.

8 THE COURT: Thank you.

9 MR. DIPAOLO: But in any event, as it relates to  
10 HSBC's cross-motion to -- or excuse me, HSBC's motion to  
11 dismiss the cross-claims of Citibank, I'm going to rely on  
12 Mr. Zarlock's, you know, recitation of the facts in order to  
13 be brief here, which are not in dispute.

14 As it relates to Citibank, what is most important  
15 is that when this check was issued, the AIG check, HSBC did  
16 not endorse the check. That is undisputed. And when HSBC  
17 was made aware of that, they immediately made a claim to  
18 Citibank in order to recover the proceeds of the check.  
19 It's a UCC claim. And there was a full negotiation between  
20 HSBC's in-house counsel and Citibank's in-house counsel  
21 where after some communications, they ultimately -- Citibank  
22 ultimately did agree to refund the funds to HSBC because  
23 they recognized that under the UCC, if there are not two  
24 endorsements, then the non-endorsement payee is entitled to  
25 the face amount of the check. So recognizing that issue,

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1 Citibank in house drafted a settlement agreement of release  
2 prepared by their in-house counsel, tendered it to HSBC, it  
3 was signed, and they tendered a check to HSBC.

4 Now, those facts are important because the  
5 cross-claims are not applicable because of the  
6 Voluntary Payment Doctrine. So Citibank had a full  
7 knowledge of the facts of the action. They elected to pay.  
8 They did not litigate. There was no reservation of rights.  
9 There was no protest, no such language anywhere in the  
10 complaint, the cross-claims, the emails among counsel  
11 or persons --

12 THE COURT: Let me just ask you, though. Is that  
13 all apparent on the face of the cross-complaint?

14 MR. DIPAOLO: Well, Your Honor --

15 THE COURT: You are citing a lot of facts, but  
16 those are facts that I am not sure that -- I mean, you are  
17 moving to dismiss on this?

18 MR. DIPAOLO: Correct.

19 THE COURT: And those are not on the -- the facts  
20 that you have recited about the settlement and all of that,  
21 they are not on the face of the complaint anywhere, are  
22 they, or are they?

23 MR. DIPAOLO: They're -- some of them are --

24 THE COURT: On any of the claim or cross-claim or  
25 anything?



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1 MR. DIPAOLO: No -- well, some the facts are in  
2 the complaint. There's allegations that the AIG check was  
3 not endorsed and that it was paid over to HSBC. Certainly  
4 we can use the document, the settlement agreement because  
5 it's related to the allegations in the cross-claim, so that  
6 can be utilized as an integral part of the allegations of  
7 the complaint as to why the check was paid over to HSBC.  
8 And that I don't believe is in dispute.

9 THE COURT: Okay. But the terms that --

10 MR. DIPAOLO: Certainly, the Court --

11 THE COURT: I mean, the Voluntary Payment Doctrine  
12 is an affirmative defense, right, and they are not required  
13 to dispute an affirmative defense on the face of a  
14 cross-claim. So how can I rely on the  
15 Voluntary Payment Doctrine?

16 MR. DIPAOLO: Well, again, the Court can certainly  
17 consider the documents referenced in the complaint. And it  
18 is clear that all payments were made voluntarily, so how can  
19 they just basically vacate their own document? And  
20 nevertheless, even if the Voluntary Payment Doctrine is not  
21 applicable, as the Court would say, then it's clear that the  
22 cross-claims cannot stand because they're barred by the UCC.  
23 It's clear on the UCC-3116 that the check needs to be  
24 endorsed by both parties, and that if because, you know,  
25 Citibank deposited the check without the endorsement,

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1 they're liable to HSBC for the face amount of the check. I  
2 don't think that can be disputed.

3 THE COURT: Well, as to that point, Mr. Goodman,  
4 how do you respond to that?

5 (No audible response.)

6 THE COURT: Mr. Goodman?

7 MR. GOODMAN: I'm sorry, Your Honor, Bruce  
8 Goodman. I had it on mute so as not to disturb anyone else.

9 THE COURT: Okay.

10 MR. GOODMAN: I apologize.

11 THE COURT: Go ahead.

12 MR. GOODMAN: What Counsel's ignoring, and we  
13 cited in our memorandum of law, is at  
14 Uniform Commercial Code 3201 in the case of *Ellinger versus*  
15 *Bank of New York*, that, A paying bank must be afforded an  
16 opportunity of discovery to establish the existence that  
17 notwithstanding an absence of endorsement that the co-payee  
18 of the check was authorized by the other co-payee to deposit  
19 the check.

20 And on the pleadings and on the face of this  
21 complaint, that's exactly Plaintiff's claim. Plaintiff  
22 claims that he was authorized to deposit this check,  
23 notwithstanding the lack of HSBC's endorsement. And on --

24 THE COURT: Excuse me. He does not claim HSBC  
25 authorized --

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1 MR. GOODMAN: He alleged that HSBC knew Plaintiff  
2 had a legal possessory --

3 THE COURT: -- him to --

4 MR. GOODMAN: The complaint alleges that HSBC knew  
5 Plaintiff had a legal possessory interest in the check.  
6 That's alleged at Paragraph 49. And HSBC hasn't presented  
7 any evidence on the motion disputing that fact, such as, you  
8 know, an affidavit or documentary evidence or otherwise that  
9 Plaintiff wasn't authorized.

10 THE COURT: There is an allegation at  
11 Paragraph 32, I think, of the cross-claim where you said  
12 that it is alleged that there was not authorization by HSBC  
13 for him to sign the --

14 MR. GOODMAN: Right. We're entitled to --

15 THE COURT: -- the check that --

16 MR. GOODMAN: -- we're entitled to plead in the  
17 alternative, certainly.

18 THE COURT: That is not pleading in the  
19 alternative. That is a fact. You cannot plead facts in the  
20 alternative. I mean, the --

21 MR. GOODMAN: Well, Your Honor, we -- that gets to  
22 the point, we don't know what the facts are here yet. It  
23 would be premature to grant HSBC's motion to dismiss the  
24 cross-claims because the position -- until the Court  
25 determines Plaintiff's claim, HSBC -- our cross-claims

1 against HSBC are valid. If the Court determines  
2 ultimately -- if the Court can determine one thing -- one of  
3 two things at the end of this case: One, that the plaintiff  
4 was entitled to these proceeds. And if that is the case and  
5 we are -- and Citibank, which is now in a loss position of  
6 \$125,000, would have to pay over another \$107,000 to  
7 Plaintiff, both Plaintiff and HSBC will have received from  
8 Citibank \$233,000, and Citibank would be in a loss position  
9 at that point of about \$340,000. And that can't be.

10 So if the Court determines that Plaintiff is  
11 entitled to the proceeding of this check, Citibank had  
12 stated claims for unjust enrichment and indemnification  
13 against HSBC. Alternatively, if the Court ultimately finds  
14 that Plaintiff was not entitled to the proceeds of this  
15 check, Citibank succeeds on its cross-claim -- or excuse me,  
16 it's counterclaim as against Plaintiff for a breach of a  
17 warranty and would not have claims for unjust enrichment or  
18 indemnification against HSBC. HSBC would be out of the  
19 case.

20 But that can't be determined on these pleadings,  
21 and it can't be that at the end of the day both HSBC gets  
22 \$233,000 from Citibank and Plaintiff gets \$233,000 from  
23 Citibank. It just -- it would be inequitable pursuant to  
24 the unjust enrichment doctrine, and we would be entitled in  
25 that case to indemnification from HSBC because we paid over

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1 the proceeds of the check to them based on their  
2 representation that Plaintiff was not entitled to it.

3 THE COURT: Indemnification is based on a  
4 vicarious liability. There is no claim here that you were  
5 vicariously liable. The claim is that you were directly  
6 liable by the plaintiff.

7 MR. GOODMAN: Well, no --

8 THE COURT: How do you have an indemnification  
9 claim?

10 MR. GOODMAN: Our cross-claim against HSBC is  
11 for common -- the indemnification claim is a common-law  
12 indemnification claim, which allowed the party that's been  
13 compelled to pay for the wrong of another to recover from  
14 the wrongdoer for damages it paid to the injured party. And  
15 in this case, if the Court ultimately determines that  
16 Plaintiff is entitled to the proceeds of the AIG check, then  
17 it will also have to have been -- it will need to determine  
18 that HSBC misrepresented its entitlement to the check --

19 THE COURT: Okay.

20 MR. GOODMAN: -- and it was not based on that  
21 representation that Citibank paid those funds over to HSBC.

22 THE COURT: Look, you have alleged at  
23 Paragraph 32, Plaintiff deposited the April 15th check to  
24 the credit of this account without HSBC's required  
25 endorsement or authorization. How do you get around the

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1 plain language, too, of the UCC that you cannot negotiate a  
2 check without both payees signing it; how do you get past  
3 that?

4 MR. GOODMAN: Well, Your Honor --

5 THE COURT: There is no allegation anywhere that  
6 HSBC authorized the plaintiff, you know, to negotiate this  
7 on his own. There is nothing like that. Plaintiff does not  
8 say that. Plaintiff does not make the claim that HSBC said  
9 it was fine with them if they took some money from the  
10 check. They do not make that argument.

11 MR. GOODMAN: Well, Plaintiff alleges in the  
12 complaint at Paragraph 49 that HSBC knew Plaintiff had a  
13 legal possessory interest in the check.

14 THE COURT: So what? That does not mean that HSBC  
15 did not.

16 Mr. DiPaolo, does Counsel for HSBC wish to respond  
17 to the argument --

18 MR. DIPAOLO: Yes, Judge.

19 THE COURT: -- by Citibank?

20 MR. DIPAOLO: First as it relates Counsel's  
21 UCC 3210 argument and the case of *Ellinger*, we respond to  
22 that in great detail in our reply brief on Pages 10 and 11.  
23 And as Your Honor indicated, that's serious inapposite.  
24 UCC 3201 only permits the transfer without a proper  
25 endorsement where the non-signing payee authorizes the

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1 transfer. As noted, there are no allegations, there is no  
2 dispute that HSBC did not authorize this. This is the whole  
3 basis of the issues that we're having with the plaintiff.  
4 So *Ellinger* is just not applicable here. It's inapposite,  
5 and that is fully briefed and detailed in our reply brief.

6 Second, as it relates to the indemnification  
7 claim, we also discuss that in our brief as an active  
8 participant in the claimed wrong, Citibank can claim  
9 indemnification. They're the party that improperly  
10 negotiated the check, and now they have their -- we have  
11 independent right to recover that. So any issue they have  
12 with Plaintiff is on them. The fact that they may suffer a  
13 loss is unfortunate for Citibank, but it's not a basis for a  
14 claim against HSBC. When they voluntarily paid the check  
15 over, they are liable under the UCC. They acknowledged it,  
16 and now they're looking to basically vacate their own  
17 settlement agreement because they maybe suffered a loss.  
18 But under the UCC, they are directly responsible and  
19 directly liable to HSBC for their own wrongdoing.

20 So under those grounds alone, there is no way  
21 around the fact that under the UCC, there is no basis for  
22 the cross-claims or indemnification.

23 THE COURT: All right, Mr. Goodman, did you want  
24 to add anything else before we close?

25 MR. GOODMAN: Your Honor, only that on the

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1 pleadings before the Court, it would be premature to grant  
2 HSBC's motion to dismiss their cross-claims. And Citibank  
3 has valid cross-claims until the Court determines that  
4 Plaintiff was not entitled to the check proceeds. And --

5 THE COURT: Well --

6 MR. GOODMAN: - in the -- I'm sorry, Your Honor.

7 THE COURT: No, go ahead. I'm sorry to interrupt  
8 you, Mr. Goodman.

9 MR. GOODMAN: And concerning the UCC, the first  
10 department in the *C.H. Sanders* case was clear that the  
11 paying bank must be afforded an opportunity to conduct  
12 discover to establish the existence of Plaintiff's  
13 entitlement -- and the plaintiff's, in this case,  
14 entitlement to the proceeds of the check.

15 THE COURT: Okay. I think you miscite that case  
16 or improperly rely on that case.

17 I am going to dismiss the cross-claims, but I am  
18 not relying on the Voluntary Payment Doctrine because I  
19 think that is outside the facts of the complaint. It relies  
20 strictly on the clear authority of the UCC here, so...  
21 Citibank negotiated the check. It is undisputed that they  
22 negotiated the check without HSBC's approval. And so based  
23 on that and based on the violation of the UCC, I am going to  
24 dismiss the cross-claims.

25 MR. DIPAOLO: Thank you.



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1 THE COURT: What is the status of the case between  
2 Plaintiff -- I guess what we have left now is the plaintiff  
3 and Citibank.

4 Has there been any discussion of a resolution of  
5 the case between those two entities?

6 MR. GOODMAN: Your Honor, this is Bruce Goodman.  
7 So, number one, Plaintiff served discovery on us  
8 to which we responded --

9 THE COURT: Okay.

10 MR. GOODMAN: -- and that was pursuant to -- I'm  
11 sorry, Your Honor?

12 THE COURT: Yes, go ahead, Mr. Goodman.

13 MR. GOODMAN: And that was pursuant to an order  
14 issued by the magistrate concerning like a pre-settlement  
15 discovery, and I believe there's a discovery offer scheduled  
16 in this case in the next several weeks. I don't have the  
17 date in front of me.

18 Concerning settlement, so as I said, right now  
19 Citibank is in a loss position of \$125,000 -- or more than  
20 that. It's actually the proceeds -- the amount of the  
21 proceeds that Citibank paid over to HSBC, you know, which  
22 was 107. And what we would require in order to settle the  
23 case is for Plaintiff to reimburse us for our loss. We have  
24 cross -- counterclaims against Plaintiff for that amount.  
25 The law is clear, and given the Court's rulings to dismiss

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1 HSBC -- to dismiss Citibank's cross-claims against HSBC,  
2 that Plaintiff improperly deposited this check without  
3 HSBC's required endorsement, he breached his warranty, his  
4 presentment warranty to the bank by depositing that check  
5 and is strictly liable for Citibank's loss occasioned by  
6 that presentment breach.

7 So what I anticipate is that if we can't otherwise  
8 resolve it, and pursuant to Your Honor's individual rules,  
9 we would likely request to make a motion for summary  
10 judgment.

11 THE COURT: Make a motion for summary judgment  
12 that you are entitled to money, that Citibank is entitled to  
13 money?

14 MR. GOODMAN: That's right, Your Honor. Because  
15 right now, we're in a loss position of \$125,000. There was  
16 \$107,000 left --

17 THE COURT: But Plaintiff --

18 MR. GOODMAN: -- in the --

19 THE COURT: Let me ask you this: Plaintiff put  
20 the check in his account --

21 MR. GOODMAN: Right.

22 THE COURT: -- and he signed it.

23 MR. GOODMAN: Right.

24 THE COURT: Why is the bank not responsible for --  
25 perhaps I am wrong about this -- for presentment of the

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1 check if he had signature, right?

2 MR. GOODMAN: No, that's incorrect, Your Honor.

3 When the payee on a check presents --

4 THE COURT: Okay.

5 MR. GOODMAN: -- the check to the bank for

6 deposit --

7 THE COURT: Right.

8 MR. GOODMAN: -- pursuant to the UCC, he's making  
9 a warranty that the check contains all proper endorsements.  
10 And in this case, and now it's a rule -- it's been cited by  
11 the Court, he didn't have all proper endorsements;  
12 therefore, he breached the presentment warranty, the UCC  
13 presentment warranty, and is liable to the bank for the  
14 losses that the bank sustained as a result of that  
15 presentment breach. That is black-letter UCC law. In UCC  
16 3417 and 4207, A plaintiff is strictly liable for breach of  
17 a -- to the bank for breach of a presentment warranty.

18 THE COURT: Has there been any consideration  
19 for --

20 (Pause in proceedings.)

21 THE COURT: Hello? Can you hear me?

22 MR. GOODMAN: I can, Your Honor.

23 THE COURT: Okay.

24 MR. ZARLOCK: Yes.

25 MR. DIPAOLO: Yes, Your Honor.

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1 THE COURT: All right.

2 Has there been any consideration of everyone just  
3 walking away from this? I do not think Plaintiff has a  
4 great case and yours -- Citibank's counterclaims seem  
5 equally to be problematic. Why don't the parties just walk  
6 away from this? It seems like to me that might make sense.

7 Mr. Katz?

8 MR. KATZ: Yes, Your Honor.

9 THE COURT: If it all comes out in discovery the  
10 way that they are saying, which is the property damaged  
11 happened after the default, why does your client -- you are  
12 not alleging anywhere that, you know, your client sent money  
13 to fix this property, so why would he be entitled to the  
14 proceeds of the check? Why don't both sides just walk away  
15 from this?

16 Assuming Plaintiff dismisses the case, is Citibank  
17 going to proceed?

18 MR. GOODMAN: I would have to -- I have not had  
19 that discussion with my client, Your Honor. As I said,  
20 right now, we are in a loss position of \$125,000. So I  
21 don't know --

22 THE COURT: Yes, but face it --

23 MR. GOODMAN: -- whether Citibank --

24 THE COURT: -- Citibank messed up. Citibank  
25 messed up. You should not have done that. You know,

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1 somebody should have looked at the back of the check.

2 MR. GOODMAN: Your Honor --

3 THE COURT: I do not know why you do not both just  
4 decide to walk away and take your marbles and go home.

5 MR. DIPAOLO: Your Honor --

6 THE COURT: Yes.

7 MR. ZARLOCK: -- just for -- what Your Honor  
8 referred --

9 THE COURT: Well, who is speaking?

10 MR. ZARLOCK: This is Mr. Zarlock from HSBC.

11 THE COURT: Okay.

12 MR. ZARLOCK: Do you want HSBC to drop off now,  
13 because you are really talking about settling between --

14 THE COURT: Yes, that is fine.

15 MR. ZARLOCK: Okay. All right. We will drop off  
16 now.

17 See you, Tony.

18 THE COURT: All right.

19 MR. ZARLOCK: See you, everyone.

20 THE COURT: Thank you.

21 MR. DIPAOLO: Take care, everyone.

22 THE COURT: All right. Thank you.

23 MR. ZARLOCK: Uh-huh. Bye-bye, everyone.

24 (The attorneys for HSBC exit the telephone  
25 conference.)

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1 MR. KATZ: Your Honor, this is Samuel Katz.  
2 Again, just to respond to what Your Honor was asking me  
3 before.

4 My client's intention actually is to use the  
5 proceeds to rehab the property so that he could start paying  
6 his mortgage again. He's not going to pay a mortgage on a  
7 property that's, you know, damaged, that's not liveable,  
8 that's not usable, and he's not going to spend, you know,  
9 \$200,000 of his own to rehab a property when he --

10 THE COURT: I thought the case was foreclosed? I  
11 thought it was in foreclosure?

12 MR. KATZ: It is in foreclosure. But if he would  
13 have the opportunity to rehab, he would take it out of  
14 foreclosure. He would reinstate it.

15 THE COURT: Is that possible that that can happen  
16 now?

17 MR. KATZ: That is definitely possible if my  
18 client is able to use those funds to rehab the property.  
19 And that's why he's been asking for this money all along.  
20 You know, before we started this lawsuit, he's been in touch  
21 with HSBC and trying to get them to agree to apply those  
22 funds --

23 THE COURT: But HSBC --

24 MR. KATZ: -- to rehab.

25 THE COURT: But HSBC is applying it to the money

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1 outstanding. I mean, that is not the case you brought  
2 against HSBC here. You know, that is a different theory.

3 MR. KATZ: That's correct, Your Honor.

4 THE COURT: HSBC, I do not know whether they have  
5 used it to fix up the property or not?

6 MR. KATZ: They did not. They took -- they  
7 applied it the amount that's in default.

8 THE COURT: Yes. Which they say they can do under  
9 the terms of their agreement.

10 MR. KATZ: Right, right.

11 THE COURT: So I still make my point, which is  
12 that I think you ought to -- the two parties ought to  
13 seriously consider the plaintiff just dropping both the  
14 complaint and the counterclaim.

15 Why don't you go back and discuss that with your  
16 representative clients and report back to the Court a week  
17 from today as to whether you can reach that resolution?

18 MR. KATZ: I will do that, Your Honor.

19 THE COURT: Okay?

20 MR. KATZ: This is Samuel Katz, Your Honor. I  
21 will do that.

22 THE COURT: All right.

23 MR. KATZ: I just want to make one more point to  
24 the Court: That if the check would have been endorsed to  
25 HSBC and to my client, my client would have had some

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1 leverage by refusing to sign off on that check that HSBC  
2 wanted to deposit to their account. My client would have  
3 had some leverage to try to convince them to use those funds  
4 towards rehabbing the property. And what happened here by  
5 them getting all the money and, you know, without even  
6 having my client sign off on that check, you know, that's  
7 where my client had a loss.

8 THE COURT: Without getting your client to sign  
9 off on what check?

10 MR. KATZ: The check that -- in other words, if  
11 Citibank would have issued the \$233,000 check to HSBC and to  
12 my client, which would have required my client's  
13 endorsement, as well as HSBC's, then HSBC would not have  
14 been able to deposit those funds without my client's  
15 cooperation.

16 THE COURT: Well, you know, I do not know about  
17 that. But I still think the actual proposed resolution  
18 makes sense, but obviously, neither side has to agree to  
19 that. I just ask you to consider it and get back to me.  
20 Okay?

21 MR. KATZ: I will, Your Honor.

22 THE COURT: Mr. Goodman, are you --

23 MR. GOODMAN: Yes, Your Honor, I will consult with  
24 my client.

25 Did the Court want to send us a specific time and



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1 date?

2 THE COURT: Yes. Why don't you just -- I mean, if  
3 you resolve it, you can send a joint letter or, you know,  
4 the parties can respond to the Court independently, if you  
5 want. But do it by next Friday, by noon of next Friday.

6 Okay?

7 MR. GOODMAN: Yes.

8 THE COURT: Okay. Thank you very much, gentlemen.

9 MR. GOODMAN: Thank you, Your Honor.

10 MR. KATZ: Thank you, Your Honor.

11 MR. GOODMAN: Stay safe, Your Honor.

12 THE COURT: Okay. Thank you, everyone. Have a  
13 good day.

14 We are adjourned. Good-bye.

15 (Matter concluded.)

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17 --oo0oo--

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23 *I (we) certify that the foregoing is a correct transcript*  
24 *from the record of proceedings in the above-entitled matter.*

25 /s/ David R. Roy  
DAVID R. ROY

*13th Day of March, 2021*  
*Date*